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IN THE

Supreme Court of the United States

October Term, 1963

No. 16

BANCO NACIONAL DE CUBA,

Petitioner,

v.

PETER L. F. SABBATINO, as Receiver, and F. SHELTON FARR, WILLIAM F. PRESCOTT, EMMET WHITLOCK, LAWRENCE H. DIXON, H. BARTOW FARR, ELIZABETH C. PRESCOTT, FABIO FREYRE and HELEN G. DOWNS, Co-Partners Doing Business as FARR, WHITLOCK & Co.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF *AMICUS CURIAE* OF THE EXECUTIVE COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

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BRIEF *AMICUS CURIAE* OF THE EXECUTIVE COMMITTEE OF THE AMERICAN BRANCH OF THE INTERNATIONAL LAW ASSOCIATION

The Executive Committee of the American Branch of the International Law Association files this brief *amicus curiae* pursuant to the written consent of the parties thereto, copies of which are attached hereto.

Interest of *Amicus Curiae*

The American Branch of the International Law Association was established in 1922 as the instrumentality in the United States of a world-wide association of some 4,000 members whose objects "include the study, elucidation and advancement of international law, public and private * * *" Article II, Constitution of the International Law Association.

Both the Association and its American Branch have for many years maintained Committees that study and report on the subject of "nationalization and foreign property."

At its Conference in New York in 1958 and in Brussels in 1962, the International Law Association passed resolutions of the greatest relevance to the issues involved in this case now before the Court.

The American Branch of the International Law Association has the greatest concern for the development of standards of international law that will promote a more secure world public order and provide the necessary foundation for an expanding international economy.

The Executive Committee of the American Branch has authorized the presentation of this brief as representing its views on the scope and applicability of the so-called act of state doctrine and the relevance of international law to be applied in this case.

Questions Presented

This brief will discuss the following questions:

1. Whether a court in the United States is authorized under the Constitution to apply international law in resolution of a controversy, within its jurisdiction, for the protection of rights of United States citizens.

2. Whether in its application of international law, a court in the United States may examine an act of a foreign state or whether it is required to impose upon itself a policy of automatic compulsory abstention.

3. Whether a court in the United States is required to enforce and implement a law of a foreign state that violates international law.

4. Whether a court in the United States is required to enforce and implement a law of a foreign state that violates the basic policy of the United States as expressed in its Constitution.

Statement

The petitioner, the state financial agent of the Government of Cuba, brought an action in the United States District Court for the Southern District of New York alleging conversion by the respondent of the proceeds of the sale of a certain shipment of sugar that had been subject to a "nationalization" and "compulsory expropriation" decree by the Cuban Government. When the Cuban decree was promulgated, the sugar was in Cuba and the property of

Companie Azucarera Vertientes—Camaguey de Cuba (CAV), a Cuban corporation, but one in which, according to the Cuban decree, nationals of the United States "have a predominating interest."

Prior to the promulgation of the Cuban expropriation decree, CAV had contracted to sell the shipment of sugar to the respondent, Farr Whitlock and Co., a New York commodity brokerage partnership.

During the loading of the sugar aboard a vessel offshore a Cuban port, the nationalization and expropriation decree was promulgated by Fidel Castro. Thus, permission of the Cuban Government was necessary for the sailing of the loaded vessel and to obtain that permission, respondent Farr, Whitlock was required to contract with a designee of the Cuban Government for purchase of the sugar. The contracts were then assigned to the petitioner who forwarded the bills of lading to Societe Generale, a French bank, to act as agent to effect collection from respondent Farr, Whitlock. After receipt of the documents, Farr, Whitlock collected payment from the customer but failed to turn over the funds because of the conflicting claims of one Sabbatino, who had been appointed receiver for the assets of CAV located in the State of New York.

Pursuant to Civil Practice Act, §977-b, providing for the appointment of a receiver to liquidate the assets of a foreign corporation that have been nationalized by a foreign state but which are located in the State of New York, a New York court appointed Sabbatino as receiver and ordered the proceeds of the sugar sale turned over to him. Petitioner amended its complaint to seek also an injunction against the receiver exercising jurisdiction over the proceeds of the sugar sale.

The District Court dismissed the complaint because the act of nationalization and expropriation was in violation of international law. 193 F. Supp. 375 (S.D.N.Y. 1961). The Court of Appeals unanimously affirmed holding that the Cuban decree violated international law. 307 F. 2d. 845 (2 Cir. 1962) and this Court granted certiorari, 372 U.S. 905 (1963).

Outline of Argument

There are many cumulative reasons for arriving at the conclusion that this Court should not create a new limitation upon its constitutional competence to declare and apply international law in appropriate cases and impose upon itself a doctrine of automatic, compulsory abstention from examining the acts of other states for their conformity to international law. Among the more important of these reasons are:

I

Under the constitutional allocation of competence within our governmental system, courts in the United States are authorized, and may often be required, to apply international law in cases and controversies over which they have jurisdiction.

A. International law is, within the United States, a part of the law of the land, binding all branches of the government.

B. Under the Constitution, competence with respect to foreign affairs is, as with respect to internal affairs, distributed among three coordinate branches of government.

C. The doctrine of political questions does not change, but merely reflects, the constitutional allocation of competence among coordinate branches of the government.

II

International law, through a widely-accepted customary rule designed to promote and sustain an international economy, today prohibits the confiscation by one state of the property of the nationals of another state.

III

The doctrine alleged to require automatic, compulsory abstention by the courts of one state from examining the official acts of the government of another state is neither a rule of international law nor a rule of this Court or of other courts in the United States.

A. The alleged doctrine of compulsory abstention is not a rule of international law.

B. The alleged doctrine of compulsory abstention is not a rule of this Court or of other courts in the United States.

IV

The appropriate application of the act of state doctrine does not require compulsory deference by the courts of the United States to the acts of another state which are in violation of international law.

V

The appropriate application of the act of state doctrine should not authorize a plaintiff to invoke the act of a for-

eign state as a basis for a cause of action; when a state or its agent becomes a plaintiff, it thereby waives its claim to preclude an examination of such act on its merits.

VI

The maintenance of both an international economy and stable community expectations about international law requires that courts apply international law when necessary for the protection of private rights.

I

Under the constitutional allocation of competence within our governmental system, courts in the United States are authorized, and may often be required, to apply international law in cases and controversies over which they have jurisdiction.

A. International law is, within the United States, a part of the law of the land, binding all branches of the government.

That international law is to be applied as the law of the land by courts in the United States has long been accepted and relied upon by all branches of the government and the public generally within our country, and the continual application and clarification of the general principles of international law by this Court has contributed to stabilizing the expectations of the peoples of the world about the consistent availability of these principles. Reliance upon the rule that international law is to be applied as the law of the land by United States courts has been justifiably based on the authoritative affirmance of that rule ever since the framing of the Constitution.

The doctrine that the law of nations is a part of the law of the land was originally formulated in England and Europe and was brought to America as part of our legal heritage.[1] The early articles collected in *The Federalist* and elsewhere, as well as the debates both before and during the constitutional convention, make it absolutely clear that the framers of the Constitution envisaged the adoption of this heritage and the incorporation of the law of nations in the law of the land.[2]

This intention was reflected and implemented in the Articles of the Constitution, most notably by the following well-known provisions: Article I, §8 empowers the Congress "to define and punish Piracies and Felonies committed on the high seas, and Offenses against the Law of Nations." Article III, §2 extends the Judicial power "to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States,

1. See Dickinson, "The Law of Nations as Part of the National Law of the United States", 101 U. of Pa. L. Rev. 26 (1952) for an analysis of this heritage and its influence on the formation and implementation of the Constitution.

2. See, for example, the following articles in *The Federalist*: No. 3 at 22 (1 Bourne ed. 1901) by John Jay; No. 80 at 112 and 114, No. 83 at 144 and No. 82 (2 Bourne ed. 1901) by Alexander Hamilton; No. 42 by James Madison. See also Dickinson, *supra* n. 1.

Citizens or Subjects." Article VI, par. 2, adds that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land."

Since its origin, moreover, this Court has time and again reinforced the expectations of the framers by explicitly affirming its duty to apply the law of nations as a part of the law of the land. As early as 1793, Chief Justice Jay stated in *Chisholm* v. *Georgia* that "Prior to that period [the date of the Constitution], the United States had, by taking a place among the nations of the earth, become amenable to the law of nations." 2 Dall. 419, at 474 (U. S. 1793). And in 1796, Justice Wilson stated in *Ware* v. *Hylton*: "When the United States declared their independence, they were bound to receive the law of nations in its modern state of purity and refinement." 3 Dall. 199, at 281 (U. S. 1796).

Chief Justice Marshall was even more explicit in *The Nereide*, when he said:

> "If it be the will of the government to apply to Spain any rule respecting systems which Spain is supposed to apply to us, the government will manifest that will by passing an act, for the purpose. 'Till such an act be passed, the Court is bound by the law of nations which is part of the law of the land.'[3]

The best known affirmance of the rule is perhaps Justice Gray's oft-cited statement in *The Paquete Habana*:

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3. 9 Cranch 388, at 423 (U. S. 1815). As to the effect such an act of Congress would have on international law, Marshall ruled a few years earlier. "An act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." For later affirmance of this principle see *MacLeod* v. *United States*, 229 U. S. 416, at 434 (1913).

"International law is part of our law and must be ascertained and administered by the courts of justice of appropriate jurisdiction, as often as questions of right depending upon them are duly presented for their determination." 175 U. S. 677, at 700 (1900).

Actually, Justice Gray had delineated that principle even more forcefully and significantly five years earlier in *Hilton* v. *Guyot* when he stated:

"International law, in its widest and most comprehensive sense—including not only questions of right between nations, governed by what has been appropriately called the 'law of nations', but also questions arising under what is usually called 'private international law' or the 'conflict of laws' and concerning the rights of persons within the territory and dominion of one system, by reason of acts, private or public, done within the dominions of another nation—is part of our law, and must be ascertained and administered by the courts of justice, as often as such questions are presented in litigation between man and man, duly submitted to their determination.

"The most certain guide, no doubt, for the decision of such questions is a treaty or a statute of this country. But when, as is the case here, there is no written law upon the subject, the duty still rests upon the judicial tribunals of ascertaining and declaring what the law is, whenever it becomes necessary to do so, in order to determine the rights of parties to suits regularly brought before them. In doing this, the courts must obtain such aid as they can from judicial decisions, from the works of jurists and commentators, and from the acts and usages of civilized nations."[4]

4. 159 U. S. 113, 163 (1895). For other cases which explicitly invoke the principle that international law is a part of the law of the land, see, for example: *The Rapid*, 8 Cranch 155, 162 (U. S. 1814); *Freemont* v. *U. S.*, 17 How. 542, 557; *United States* v. *Arjona*, 120 U. S. 479(U S. 1887); *Talbot* v. *Janson*, 3 Dall. 133, 161 (1795); *Respublica* v. *DeLongchamps*, 1 Dall. 111, 116 (1784).

This principle that United States courts have a duty to apply international law as part of the law of the land has thus been repeatedly invoked and accepted throughout the history of this Court. The broad range of the types of cases in which this Court has, in fact, applied and clarified the principles of international law is, further, of great significance. Before crime against the United States became wholly statutory, individuals were tried and convicted in federal courts for offending against the law of nations. See *Republica* v. *DeLongchamps*, 1 Dall. 111, 116 (1784); *Talbot* v. *Janson*, 3 Dall. 133, 161 (1795). The traditional body of the law maritime has been repeatedly recognized and applied as part of our national law. See *Chisholm* v. *Georgia*, 2 Dall. 419 (U. S. 1793); *Waring* v. *Clarke*, 5 How. 441, 459 (U. S. 1847); *The Moses Taylor*, 4 Wall 411 (U. S. 1866); *The Scotia*, 14 Wall 170, 188 (U. S. 1871); *The Lottawana*, 21 Wall 558 (1874); *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205 (1917). International law has also been relied upon in cases concerning the acquisition and control of territory, see *Jones* v. *United States*, 137 U. S. 202, 212 (1890); *The American Insurance Co.* v. *Canter*, 1 Pet. 511 (U. S. 1828); *Stewart* v. *Kahn*, 11 Wall 493 (U. S. 1870); *United States* v. *Huckabee*, 16 Wall 414 (U. S. 1872); *Mormon Church* v. *United States*, 136 U. S. 1 (1890); *Dorr* v. *United States*, 195 U. S. 138 (1904), and the resolution of boundary disputes, see, *e.g.*, *Iowa* v. *Illinois*, 147 U. S. 1 (1893); *Arkansas* v. *Tennessee*, 246 U. S. 158 (1918); *Minnesota* v. *Wisconsin*, 252 U. S. 273 (1920); *Nebraska* v. *Iowa*, 143 U. S. 359 (1892); *Indiana* v. *Kentucky*, 136 U. S. 479 (1890); *Church* v. *Hubbart*, 2 Cranch 187 (U. S. 1804); *Cunard Steamship Co.* v. *Mellon*, 262 U. S. 100 (1923), as well as in those dealing with the effect of a transfer of ter-

ritory on the private rights of those within the territory.[5] It has likewise been the source of this Court's decisions in numerous cases involving questions of nationality, see, *Shanks* v. *Dupont*, 3 Pet. 242 (U. S. 1829); *Inglis* v. *The Trustees of the Sailor's Snug Harbour*, 3 Pet. 99 (U. S. 1830); *United States* v. *Wong Kim Ark*, 168 U. S. 649 (1898); *The Chinese Exclusion Case*, 130 U. S. 581 (1889); *Fong Yue Ting* v. *United States*, 149 U. S. 698 (1892); *Nishimura Ekiu* v. *United States*, 142 U. S. 651 (1892), sovereign immunity, see *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1812); *Berizzi Brothers Co.* v. *Steamship Pesaro*, 271 U. S. 562 (1926), the scope of the treaty power, and the interpretation and termination of treaties. See, *Ware* v. *Hylton*, 3 Dall. 199 (U. S. 1796); *Hauenstein* v. *Lynham*, 100 U. S. 483 (1879); *Geofroy* v. *Riggs*, 133 U. S. 258 (1890); *Missouri* v. *Holland*, 252 U. S. 416 (1920); *Karnuth* v. *United States*, 279 U. S. 231 (1929). Finally, the whole body of international law relating to the principles of war and neutrality have been consistently applied by this Court. See *The Peterhoff*, 5 Wall 28 (U. S. 1867); *The Steamship Appam*, 243 U. S. 124 at 149; *The Thompson*, 3 Wall 155 (U. S. 1866); *The Bermuda*, 3 Wall 514 (U. S. 1866).

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5. See *American Insurance Co.* v. *Canter*, 1 Pet. 511 (1828); *United States* v. *Percheman*, 7 Pet. 51 (U. S. 1833). In the latter case, Chief Justice Marshall, in holding that, though rights in public property go with a transfer, vested rights in private property are to be respected by the succeeding sovereign, made the following most relevant statement at 86-87:

> "The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole world would be outraged, if private property should be generally confiscated and private rights annulled."

B. Under the Constitution, competence with respect to foreign affairs is, as with respect to internal affairs, distributed among three coordinate branches of government.

The comprehensive management of the foreign affairs of the United States, as of other countries, embraces many diverse activities; and, within the United States, constitutional competence for controlling and performing these various activities is widely distributed among the three coordinate branches of the government.

The many diverse activities which constitute the management of the foreign affairs of the United States extend, beyond the official-to-official negotiations commonly described as the "conduct of foreign affairs", to include: first, the clarification and prescription of the basic community policies which serve to guide and regulate not only official-to-official negotiations and interactions but also the whole multifarious flow of private, non-governmental activities across state lines; and, second, the continuous authoritative application of these basic community policies in specific instances of controversy which arise from both the official-to-official interactions and the whole complex of official and private interactions.

It scarcely requires a comprehensive and precise specification of the constitutional allocation of competence in the United States to establish that all three major branches of government are accorded important roles in the control and performance of these various activities. One needs only to recall the many specific grants of competence to the Congress, to the President, and to the Judiciary—grants which cannot be made meaningful except in terms of control over

foreign affairs—to be reassured that with respect to such affairs, no less than with respect to internal affairs, the framers of the Constitution sought a balancing of effective power among the three branches of the government, and not a monopolization of power by any single branch. Broad outlines of the structure are summarized in McDougal and Associates, Studies in World Public Order (1960) 475-504. The entire history of our country, exhibiting a consistent pattern of practices in all three branches of government, confirms that this division and balancing of constitutional competence remains the authoritative expectation of our whole national community.

The necessary preeminence of the Executive in the actual conduct of official-to-official negotiations should not be permitted to obscure that the other branches of the government have important roles to perform in the management of foreign affairs. The competence of the Congress in exercise of its comprehensive legislative function to clarify and prescribe both the fundamental objectives of our foreign policy and detailed modalities for its implementation is too well known to warrant exposition. Equally familiar is the competence of the Senate to provide advice and consent to the making of treaties and to the appointment of ambassadors, other public ministers, and consuls. Similarly, that the competence of the judicial branch of the government to apply the law of the land, international and other, to controversies within its jurisdiction also includes a competence to clarify and protect the fundamental objectives of our foreign policy will not be challenged by any who are familiar with the common law tradition of courts.

The plain fact is that the fixing of the fundamental objectives of our foreign policy is not, and cannot safely be made,

a task for any single branch of our government. The executive is not the sole creator and judge of our objectives or even of the instrumentalities for the achievement of our objectives: the task is one for all the coordinate branches of our government. Surely no one could seriously propose that the fact that legislative action may impair what the executive branch considers our most desirable foreign policy could be justification for the Congress' automatic, compulsory abstention from its designated legislative function. It is no less unhistoric and dangerous to demand that the judiciary automatically and compulsorily abdicate and leave the assessment of the legality of the acts of a foreign government to the Executive, except where the Executive affirmatively seeks the assistance of the judiciary. The appropriate constitutional task for the Executive is not to seek to substitute itself for the other branches of the government but rather, within the broad outlines of the fundamental objectives established by all branches of government, to bring its unique competence for negotiation to bear in support of the decisions of the other branches of the government. Thus, the beneficent measures, described in the Government's *amicus* brief pp. 30-32, which the Executive may take for the protection of the private rights of citizens should be in supplement to, and not in derogation of, the competence of this Court.

It should not be necessary at this date in our legal development to argue in detail that courts have certain capabilities, perhaps not shared in the same degree by the executive branches of government, to apply general legal rules, whether international or national, in specific controversies for the protection of private rights and the promotion of basic community objectives. Historically, the courts of the

United States have performed a most important role, as our summary above describes, in the clarification and application of international rules in many different types of controversies arising from interactions between this country and other countries. It should require a most compelling case to cause this Court to abdicate this important constitutional role.

C. The doctrine of political questions does not change, but merely reflects, the constitutional allocation of competence among coordinate branches of the government.

The doctrine of political questions has been developed and employed by the courts of this country for the purpose of aiding them in fulfilling their duty of interpreting and clarifying the proper allocation of competence among the coordinate branches of our government. It is a concept which reflects and contributes to the historical views of this Court as to its proper role in relation to the other coordinate branches. The doctrine need not be employed, as the language of some would appear to demand, to disrupt the "normal" allocation of competence.

Fortunately, this Court has recognized the confusion and misunderstanding which has occasionally resulted from a talismanic application of the doctrine and has recently reclarified the nature and purpose of the concept of "political questions." Mr. Justice Brennan, speaking for the majority in *Baker* v. *Carr*, 369 U.S. 186 (1962), took pains to make clear that when a court decides that a question is "political," it is not imposing a bar to judicial inquiry into an "otherwise" justiciable issue, but is rather making a

basic judgment about the inherent requirements of the separation of powers under our system of government.

> "The nonjusticiability of a political question is primarily a function of the separation of powers. Much confusion results from the capacity of the 'political question' label to obscure the need for a case-by-case inquiry. Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution." *Baker* v. *Carr*, 369 U. S. 186, 210-211 (1962).

The opinion of this Court in *Baker* v. *Carr*, in addition to clarifying the nature of the political question doctrine, provided a comprehensive test to guide courts in determining whether a given issue is "political." Justice Brennan, after noting that every question properly held to be political "has one or more elements which identify it as essentially a function of the separation of powers," *id.*, 217, proceeded to list these elements as follows:

1) "A textually demonstrable constitutional commitment of the issue to a coordinate political department."

2) "A lack of judicially discoverable and manageable standards for resolving it."

3) "The impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion."

4) "The impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government."

5) "An unusual need for unquestioning adherence to a political decision already made."

6) "The potentiality of embarrassment from the multifarious pronouncements by various departments on one question." *Id.*

The absence of all of these "elements" in the issue now before this Court is conspicuous. The inapplicability of the first criterion cited is not, and could scarcely be put, in dispute. As to the second and third items, this Court has consistently held that the principles of international law afford proper and discernible standards which make judicial decision not only possible but imperative.[6] That an independent resolution of this case by the Court would not represent lack of respect for the Executive branch but rather recognition of a judicial duty has been demonstrated in sections A and B of this brief, above. Element (5) is obviously inapplicable, since there has been no prior political decision in this case. Finally, not only has the Executive branch neglected to present this Court with a single reason to support its contention that an adverse judicial decision would "embarrass" its position, but it has itself previously pronounced its agreement with the adverse decision that it fears, i.e., that the confiscation was a violation of international law. See 43 Dep't State Bull. 171 (1960). The inevitable conclusion in such a situation was drawn by this Court in *Baker* v. *Carr* when it said:

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6. See, for example, *United States* v. *Smith*, 5 Wheat. 153 (U. S. 1820) which involved an act of 1819 making piracy "as defined by the law of nations" punishable with death. The Act was challenged as an insufficient exercise of the power to define. The Court rejected this contention and concluded, at 162: "We have, therefore, no hesitation in declaring that piracy, by the Law of Nations, is robbery upon the sea, and that it is sufficiently and constitutionally defined by the fifth section of the Act of 1819."

> "Unless one of these formulations [i.e. the above six] is inextricable from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker* v. *Carr*, 369 U.S. 186, 217 (1962)

A review of the leading cases in which this Court has applied the doctrine of "political questions" reveals that the Court has considered itself bound by an Executive decision only with respect to issues which demand a determination of the basic constitutive elements of a foreign state's existence and operation. Thus, when the issue has been the "legal existence" of a foreign state (recognition), *Gelston* v. *Hoyt*, 16 U.S. (3 Wheat.) 246 (1818); *United States* v. *Palmer*, 3 Wheat. 610 (1818); *United States* v. *Klintock*, 5 Wheat. 144 (1820); *The Sapphire*, 78 U.S. (11 Wall) 164, 168 (1871); *Latvian State Cargo and Passenger S.S. Line* v. *McGrath*, 188 F. 2d 1000 (D.C. Cir. 1951); *State Cargo and Passenger S. S. Line* v. *United States*, 116 F. Supp. 447 (Ct. of Claims, 1953), or the status which a foreign state and its property shall enjoy in this country (sovereign immunity), see, *The Schooner Exchange* v. *M'Faddon*, 11 U.S. (7 Cranch) 116 (1812); *The Cassius*, 2 U.S. (2 Dall.) 365 1796); *The Pizarro*, 19 Fed. Cas. 786, No. 11199 (S.D.N.Y. 1852); *Ex Parte Muir*, 254 U.S. 522 (1921); *Ex Parte Peru*, 318 U.S. 578 (1943), or the authorization of its representatives for state-to-state negotiation (diplomatic immunity), see, *The Anne*, 3 Wheaton 435 (1818); *Ex Parte Hitz*, 111 U.S. 776 (1884); *In re Baiz*, 135 U.S. 403 (1890); *United States* v. *Coplon*, 84 F. Supp. 472 (S.D.N.Y. 1949); *United States* v. *Melekh*, 190 F. Supp. 67 (E.D.N.Y. 1960), or the extent of its competence and control over territory (in international territorial disputes), (See, *Foster and Elam* v.

Neilson, 27 U.S. (2 Pet.) 253 (1829); *Williams* v. *Suffolk Insurance Co.*, 38 U.S. (13 Pet.) 415 (1839); *Jones* v. *United States*, 137 U.S. 202 (1890); *Wilson* v. *Shaw*, 204 U.S. 24 (1907); *Cheng Fu Sheng* v. *Rogers*, 177 F. Supp. 281 (D.D.C. 1959), the courts have correctly recognized the inappropriateness of an independent judicial determination and accepted the Executive's view as relatively conclusive. These are the types of issues which may be characterized, in the words of Justice Frankfurter, as "broad issues of political organization historically committed to other institutions and for whose adjustment the judicial process is ill-adopted." *Baker* v. *Carr*, 369 U.S. 186 at 289 (1962). They are, moreover, to apply the Court's test in *Baker* v. *Carr*, obviously all issues which involve at least one of the crucial six elements.

It is significant, however, that with respect to other issues which may be said to bear on the conduct of foreign relations, but which do not require a judgment about the basic constitutive organization of a foreign state or its indispensable operations in relation to other states, courts in the United States have consistently expressed the view that the opinion of the Executive branch, while appropriate for consideration, is not binding. See, *e.g.*, *Ware* v. *Hylton*, 3 U.S. (3 Dall.) 199 (1796); *Factor* v. *Laubenheimer*, 290 U.S. 276 (1933); *Kplovrat* v. *Oregon*, 366 U.S. 187 (1961); *Charlton* v. *Kelly*, 229 U.S. 447 (1913); *Society for the Propagation of the Gospel* v. *New Haven*, 21 U.S. 464 (1823); *Clark* v. *Allen*, 331 U.S. 503 (1947). Indeed with respect to issues of this kind, this Court has often explicitly rejected the Executive's view. See *Perkins* v. *Elg*, 307 U.S. 325 (1939); *United States* v. *Rauscher*, 119 U.S. 407 (1886); *Vermilya-Brown Co.* v. *Connell*, 204 U.S. 24 (1907); also *United States* v.

Bussoz, 218 F. 2d 683 (9th Cir. 1952). See also Jaffe, *Judicial Aspects of Foreign Relations* 233 (1933). Moreover, when an issue does not require a judgment about a part of a foreign state's fundamental political constitution, but rather, as in the instant case, involves the legality of a particular decision taken by that state in its regulation of wealth transactions or other value processes across state boundaries, courts have never upheld an Executive decision which sanctions a violation of international law.

The well-known case of *United States ex rel. Schwartzkopf* v. *Uhl*, 137 F. 2d 898 (2nd Cir. 1943), is an excellent example. The issue there was whether Schwartzkopf could be interned as an enemy alien under power of a Presidential proclamation made pursuant to an Act of 1798. The question turned on whether the annexation of Austria by Germany in 1938 and a subsequent German decree conferring German citizenship on all Austrians made Schwartzkopf a German "citizen" within the meaning of the Act of 1798. Schwartzkopf claimed that he was still a citizen of Austria, not an enemy country. The Attorney General argued that, since the United States had recognized the *de facto* sovereignty of Germany over the territory formerly known as Austria, the court was bound to give effect to the German decree conferring German citizenship on all Austrians and must therefore find Schwartzkopf to be a German "citizen". In the record before the court, moreover, there was a letter from the Secretary of State expressing the view that "Mr. Schwartzkopf should be regarded as a German citizen or subject." *Id.* 900. The court refused to accept this view, noting that "the dispute as to recognition or non-recognition by the United States of the conquest of Austria raises a wholly irrelevant issue." *Id.* 901. The

real question, the court did not hesitate to point out, was the legal effect of the German decree under the principles of international law. After a detailed analysis, the Court, holding for Schwartzkopf, concluded that "an invader cannot under international law impose its nationality upon non-residents of the subjugated country without their consent, express or tacit." *Id.* 902.

The *Schwartzkopf* case thus clearly illustrates the principle that, though a court must accept as binding an executive decision relating to the basic constitutive nature of a foreign state, its acceptance of that decision does not preclude judicial inquiry into the legal effects of that decision on other related issues. For example, though the State Department's "suggestions" of immunity traditionally state that it "accepts as true" the allegations as to ownership of property made by a foreign nation, this Court and other courts have nevertheless considered themselves free to look into the question of title. See *Ex Parte State of New York*, 256 U.S. 503 (1921), *U.S.S.R.* v. *National City Bank*, 41 F. Supp. 353 (S.D.N.Y. 1941); Note, 61 Mich. L. Rev. 396 (1962). Similarly, the Court, though bound to accept the State Department's decision as to recognition, has not found itself thereby foreclosed from judicial interpretation of the legal effects of this decision. See *Kennett* v. *Chambers*, 55 U.S. (14 How.) 38 (1852); *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938). See also *Amtorg Trading Corp.* v. *United States*, 71 F. 2d 524 (C.C. Pa. 1934). The statement of Judge Lehman in *Russian Reinsurance Co.* v. *Stoddard* is most pertinent:

> "The State Department determines whether it will recognize its [a succeeding foreign state's] existence as lawful, and until the State Department has recognized

> the new establishment, the court may not pass upon its legitimacy or ascribe to its decrees all the effect which inheres in the laws or orders of a sovereign. The State Department determines only that question. It cannot determine how far the private rights and obligations of individuals are affected by acts of a body not sovereign or with which our government will have no dealings. That question does not concern our foreign relations. It is not a political question but a judicial question." 240 N.Y. 149 (1925).

There can, hence, be found in the doctrine of "political questions" no rational support for the unprecedented claim in the Government's *amicus* brief that the Executive be accorded a virtual monopoly competence over the application of international law within this country; on the contrary, the decisions of this Court and of other courts point inexorably in the opposite direction.

II

International law, through a widely-accepted customary rule designed to promote and sustain an international economy, today prohibits the confiscation by one state of the property of the nationals of another state.

The point of most urgent significance in this case is that there is a widely accepted principle of customary international law which requires application if private rights and the public interest are to be protected. This principle is that which imposes a prohibition upon the confiscation by one state of the property of the nationals of another state. In contrast to the lack of authority which attends all for-

mulations of the alleged doctrine of automatic, compulsory judicial abstention from examination of the acts of a foreign government, the broad contours of the general principle, designed to support and maintain an international economy, that it is unlawful for one state to confiscate the property of the nationals of another state today represent shared expectations of authoritative decision in much of the world. Despite all the continuing debate about the detailed requirements of compensation, or about the relevant indices of discrimination, or about the nature of the "public purpose" requirement, the basic policy which makes discussion of these various modalities relevant is as fully accepted as any principle of customary international law can aspire to be in the contemporary world.[7] The detailed documentation of this acceptance has been reviewed in both of the lower court opinions and in other *amicus* briefs. In the hope and belief that this documentation is sufficiently adequate to be persuasive, no further review will be offered here. We would incorporate by reference the two lower court opinions and the briefs *amicus* by the American Bar Association and the Association of the Bar of the City of New York.

The common interest of all peoples who cherish a pluralistic, international economy in the continued maintenance of this customary rule against the confiscation of foreign-owned property is well stated in Anderson, Basis of the Law Against Confiscating Foreign-Owned Property, 21 Am. J. Int'l L. 525, 526 (1927):

7. For an official statement of the understanding of the International Law Association of this policy, as moved by Lord McNair and supported by Professor Philip C. Jessup, see the detailed Resolution on Nationalization and Foreign Property adopted at the 1958 New York Conference. Report of the Forty-Eight Conference, pp. XI, 143-145 (1959).

"It must be noted that this accepted principle, which safeguards foreign-owned property from confiscation in time of peace, has become part of the law of nations not merely because it represents a universally recognized standard of justice, but also because it is absolutely essential for the welfare of every nation, for without its protection no commercial, or financial international intercourse could safely be carried on.

"Accordingly, the real basis for the adoption and enforcement of this protective principle in international relations is its appeal to enlightened public opinion, not alone on the ground of inherent justice, but also on account of reciprocal benefits. It derives its real authority and permanence from the universal need by all nations of foreign trade for their prosperity, and in the mutual benefits which nations receive through the investment of foreign capital for the development of national resources.

"The investment of surplus capital in foreign countries goes hand in hand with this principle of international law prohibiting the confiscation of foreign-owned property, and all of the indispensable business of international trade and foreign investment will automatically cease whenever the protection of the correlative law of nations against the confiscation of foreign-owned property is repudiated."

III

The doctrine alleged to require automatic, compulsory abstention by the courts of one state from examining the official acts of the government of another state is neither a rule of international law nor a rule of this Court or of other courts in the United States.

A. The alleged doctrine of compulsory abstention is not a rule of international law.

The claims nation-states make against each other for jurisdiction over particular events are of two types or forms: primary and secondary. In the primary form of claim, a state asserts a competence to apply its authority directly to a person or thing, without any mediation by the officials of other states. Though such assertion typically rests upon some degree of effective control over a person or thing, the mere possibility of such control may be regarded by a state as a sufficient basis for its attempted application of authority. In these instances of primary claim, when a state also asserts a competence to prescribe the law which it is applying, it may invoke any of the familiar principles of jurisdiction, such as "territoriality", "nationality", "passive personality", "protection of national interests", and "universality".

In the secondary form of claim, a state which has already made, or sought to make, an application of authority demands of another state, perhaps with more effective control, that it defer to or recognize its prior application with respect to matters within the control of the other state. This secondary assertion of a competence to apply author-

ity is sometimes labeled "indirect jurisdiction" and is commonly discussed in terms of the recognition and enforcement of foreign judgments. Sometimes, however, the concept is generalized as that of "acts of state" and is expanded to include all official acts, including executive and legislative as well as judicial. In an interdependent world in which people and goods frequently move across state lines, and in which the promise of mutual tolerance and threat of reciprocal retaliation are the principal sanctions of an international law designed to secure common interest, it should not be surprising that states do in considerable measure reciprocally honor each other's acts of state of all kinds which are in accord with the international law of jurisdiction and state responsibility. Indeed it is difficult to understand how, in today's world, the principles of jurisdiction, and other international law principles designed to secure an international economy and generally stable world public order, could be otherwise established as authoritative and made effective in application.

This growing practice of states of honoring each others' official acts which are in accord with the whole corpus of international law, jurisdictional and other, cannot, however, either accurately or appropriately, in terms of general community interest, be metamorphosed, as the Government's *amicus* brief seeks, into a doctrine which requires the courts of one state automatically and compulsorily to abstain from examining the acts of another state for their conformity to the legal standards of the general community. To establish such a doctrine would be completely to subvert the general community policy of stabilizing peoples' expectations about the application of law across state lines, and so spurious a conception finds no support in either the historic or the

contemporary practice of states. Indeed, outside Anglo-American practice, it is still difficult to find continuous and persuasive support for the recommended, more modest doctrine that the courts of a state should accord an appropriate deference to judgments rendered in another state, when such judgments are within the agreed competence of that state and not contrary to the policies of the forum. Thus, the most distinguished contemporary writer in the field of private international law has summarized:

> "In both cases the issue is the delimitation of jurisdiction. French jurists speak in the first case of *compétence générale directe*, in the second of *compétence générale indirecte*. Unfortunately the delimitation of jurisdiction is very different in the two cases. Every state is inclined to concede to its own courts a wider jurisdiction than it is prepared to recognize in foreign courts, and no rule of international law prevents states from establishing such discordance. A distribution of judicial competence among the different states by international conventions or unwritten international law does not exist, apart from the rules on immunity of foreign states, sovereigns, and diplomatic representatives. Thus every country is at liberty to decide in which cases it will itself assume jurisdiction (and whether it claims exclusive or merely concurrent jurisdiction), and in which cases it will recognize foreign jurisdiction (again, either exclusive or concurrent)." Wolff, Private International Law 53 (2d ed. 1950).

The liberty which Professor Wolff discerns international law to confer upon states is even in contemporary practice freely exercised. Thus, many states refuse to recognize a foreign judgment unless a treaty specifically provides for such action. Lorenzen, The Enforcement of Amer-

ican Judgments Abroad, 29 Yale L. J. 188, 193-94 (1919). Other states on occasion permit recognition and enforcement but reserve the right freely to review the merits of the original judgment. Nadelmann, Reprisals Against American Judgments, 65 Harv. L. Rev. 1184, 1187 n. 12 (1952). In a considerable number of states foreign judgments are given effect only on the basis of reciprocity, and the requirement of reciprocity is subject to many different interpretations. Nussbaum, Principles of Private International Law, 237-38 (1943). Even the states which permit recognition of foreign judgments require that such judgments be rendered by courts of competent jurisdiction, and this requirement also admits of various interpretations. *Id.* 239. There are further familiar requirements that judgments must be free from fraud and not "fiscal" or "penal".

If even the judgments of courts are subject to examination by the state of the forum upon so many grounds, can it reasonably be conceived that community expectation requires that executive and legislative acts be accorded an absolute conclusiveness? The clear trend of opinion and decision appears to be to the contrary. Thus, the authoritative American Law Institute concludes that international law does not require that one state automatically give effect to, or defer to, the acts or laws of another state. See PROPOSED OFFICIAL DRAFT OF THE RESTATEMENT OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, §9 (1962). Neither is the compulsory abstention doctrine, which is commonly related to only one particular category of law of a foreign state, outside of the general rule that international law does not require a state to give effect, or defer to, the law or acts of another state. *Id.* §41, comment g and Reporters' Note 2 thereto.

An examination of the law of several leading commercial countries in Europe indicates, further, that they do not consider the compulsory abstention doctrine to be a rule of international law. Courts in France, Germany and The Netherlands have, on occasion, rejected application of the doctrine usually on the ground that the act of the foreign state was contrary to the public policy of the forum. *Société Potasas Ibericas* v. *Bloch*, Supreme Court (France), March 14, 1939 [1939] Dalloz I 257 [1938-1940] Ann. Dig., 152 (no. 54); *Union des Républiques Socialistes Soviétiques* v. *Intendant Général Bourgeois Ès-Qualité et Société La Ropit*, Supreme Court (France), March 5, 1928, Sirey I, 217 [1927-1928] Ann. Dig. 67 (No. 43); *Volatron* v. *Moulin*, Court of Appeal of Aix, March 25, 1939, [1939] Dalloz I, 329, [1938-1940] Ann. Dig. 24 (No. 10). Dutch courts have examined acts of foreign states to determine whether they are consistent with international law and have refused to defer to those that were not. *Bank Indonesia* v. *Senembah Maatschappij N.V. and De Twentsche Bank N.V.* (1959), Nederlandse Jurisprudentie 855 (Ct. of Appeals of The Hague 1959); *P.T. Escomptobank* v. *N.V. Assurantie Maatschappij de Nederlanden* (Ct. of Appeal of The Hague, June 6, 1963) (text of decision on file in Library of Ass'n of the Bar of the City of New York). The German courts concur in the view that the compulsory abstention doctrine is not a rule of international law and that examination of acts of foreign states on their merits is proper. *Registration of Trademark Koh-I-Noor*, 1963 Neue Juristische Wochenschrift 1541 (Federal Tribunal, March 8, 1963). For a comprehensive review of decisions of foreign courts that have examined acts of foreign states on their merits, see Appendix I to the *amicus* Brief for the Committee on Interna-

tional Law of the Association of the Bar of the City of New York.

One of the principal cases cited by the Government in its *amicus* brief for the proposition that the compulsory abstention doctrine is a rule of international law is *Underhill* v. *Hernandez*, 168 U. S. 256 (1897). Although the language of Chief Justice Fuller is sweeping in its terms,[8] no violation of international law was charged and in other passages of the opinion, the decision appears to rest upon the accepted immunity of governmental officials in the performance of their functions rather than upon an alleged act of state doctrine. For at page 252, the Chief Justice stated:

> "The immunity of individuals from suits brought in foreign tribunals for acts done within their own States, in the exercise of governmental authority, whether as civil officers or as military commanders, must necessarily extend to the agents of governments ruling by paramount force as matter of fact."

Certainly, the facts of this case raise only an issue of immunity of a governmental official for acts arising out of the performance of his governmental functions. The plaintiff was an American citizen, resident in Venezuela, who had constructed a water works for the city of Bolivar under a contract with the local government. He was engaged in supplying water to the city when it was occupied by the defendant, General Hernandez, on behalf of a revolutionary group that was later recognized by the United States as the government of Venezuela following its conquest of

8. "Every sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory" at p. 252.

the predecessor. Sometime after Hernandez occupied Bolivar, plaintiff applied to him, as commander of the city, for permission to leave. After permission was refused for a period of several days, it was finally granted and plaintiff left the country. The Chief Justice clearly rested his decision, as indicated in the quotation above, upon the immunity of a government official for his acts rather than upon some alleged rule of international law demanding dogmatic deference to acts of a foreign state; the case involved a traditional question of immunity of a state or its agents. The issue of the responsibility of the state of Venezuela was clearly not before the court in the same way that the responsibility of the Castro government is before this Court; hence, the Court could not have been addressing itself to the issue of recognizing an act of state as that issue is before the Court in this case and other comparable cases.

Some attribute the paternity of the alleged compulsory abstention doctrine, however spurious, to the case of *Hudson* v. *Guestier*, 8 U.S. (4 Cranch) 293 (1808). It is significant, however, that in even this very early case, the Court clearly anticipated limitations upon the act of state doctrine when it held that the Court could not review the correctness of a seizure by a foreign power within the territorial jurisdiction of that sovereign, "*unless the court passing the sentence loses its jurisdiction by some circumstance which the law of nations can notice.*" *Id.* 293. That case, moreover, was a companion case of *Rose* v. *Himely*, which also involved seizures and condemnations of American vessels by French privateers for alleged violations of French law, in which Chief Justice Marshall stated in language which, despite the subsequent history of the case, remains authoritative:

> "If the court of St. Domingo had jurisdiction of the case, its sentence is conclusive. If it had no jurisdiction, the proceedings are *coram non judice*, and must be disregarded. Of its own jurisdiction, so far as depends on municipal rules, the court of a foreign nation must judge, and its decision must be respected. But if it exercises a jurisdiction which, according to the law of nations, its sovereign could not confer, however available its sentences may be within the dominions of the prince from whom the authority is derived, they are not regarded by foreign courts. This distinction is taken upon its principle, that the law of nations is the law of all tribunals in the society of nations, and is supposed to be equally understood by all. 8 U.S. (4 Cranch) 240, 275 (1808).

Neither of these cases supports the authority of an act of state doctrine which precludes a court in the United States from examining acts of a foreign state to determine whether they satisfy standards of international law. Indeed, the asserted enforcement jurisdiction of the prize court was examined into by this Court because it was charged with being in violation of international law, and Chief Justice Marshall clearly stated that "law of nations is the law of all tribunals in the society of nations." *Id.* 275.

The *amicus* brief of the Government seeks comfort also in the early English Chancery case of *Blad* v. *Banfield*, 3 Swan. 604, 36 Eng. Rep. 992 (1674). However, a careful study of the facts of that case as contained in the report does not support its relevance to the instant problem. First, there was no violation of a rule of international law and in *obiter dicta*, the court discussed the matter of personal immunity of government officials for their governmental acts and not the act of state doctrine. *Id.* 606.

The cases to be discussed in Section B and Point Four below will be seen further to confirm the conclusion that the compulsory abstention doctrine has no legitimate place in the general community expectations commonly described as international law.

B. The alleged doctrine of compulsory abstention is not a rule of this Court or of other courts in the United States.

The act of state doctrine has, fortunately, never been applied by this Court or by other courts in the United States in a way to compel compulsory judicial abstention as contrasted with independent adjudication. The briefs of Petitioner and the Government indicate that this Court should declare itself without competence to examine acts of the officials of other states to determine their conformity to international law. Contrary to the position advanced by the Petitioner and the Government, the law and practice of this Court and of other American courts show that generally acts of officials of foreign states are subject to judicial inquiry upon many grounds.

The most obvious cause for judicial examination is, as indicated above, whether the act of the foreign state was within the jurisdiction of that state. This Court has long held that it will deny deference to a decision of a foreign court if the foreign court did not have jurisdiction. In *Hilton* v. *Guyot*, 159 U.S. 113 (1895) Justice Gray stated:

> "The extent to which the law of one nation, as put in force within its territory, whether by executive order, by legislative act or by judicial decree, shall be allowed to operate within the dominion of another nation, depends upon what our greatest jurists have been content to call 'the comity of nations.'" *Id.* 163.

Certainly, as against this test an act of state of the present Government of Cuba, which is contrary to international law, is entitled to no deference in this Court. On the subject of comity, Justice Gray went further:

> "'Comity,' in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international law and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws." *Id.* 163-164.

This passage would appear comprehensively to set forth an authoritative policy appropriate to all types of acts of foreign states. Clearly, there is no hint of compulsory abstention in the Court's attitude.

On the status of foreign judgments, this Court stated:

> "The decisions of this court have clearly recognized that judgments of a foreign state are *prima facie* evidence only . . ." *Id.* 182.

No persuasive reason has been advanced to support a position that executive or administrative decrees should be entitled to any greater deference. Indeed, if a comparison is to be made, because of the very nature of the judicial process, a presumption might be indulged in favor of the greater conclusiveness of judgments.

It is well settled, furthermore, that when an act of a foreign state comes before a court in the United States, it is subject to immediate examination to determine whether it is penal in nature; if such is its nature, it will not be enforced. *The Antelope*, 10 Wheat. 66, 123 (U.S. 1825);

Huntington v. *Attrill*, 146 U.S. 657, 668 (1892); *Loucks* v. *Standard Oil Co. of New York*, 224 N.Y. 99 (1918). Similarly, some courts in the United States examine an act of a foreign state to determine whether it is of a tax or revenue nature. *Moore* v. *Mitchell*, 28 F. 2d 997 (S.D. N.Y. 1928); *City of Detroit* v. *Proctor*, 44 Del. 193, 202, 61 A.2d 412, 416 (1948); *Colorado* v. *Harbeck*, 232 N.Y. 71, 133 N.E. 357 (1921).

In accordance with the international law principles stated above, a judicial act of a foreign state may also be examined to ascertain whether there was fraud in connection with its rendition. If fraud is found, it will not be enforced in an American court. *The W. Talbot Dodge*, 15 F. 2d 459 (S.D. N.Y. 1926); *Title Ins. and Trust Co.* v. *California Development Co.*, 171 Cal. 173, 152 Pac. 542 (1945).

Following a practice in no way unique, courts in the United States have, finally, examined confiscatory acts of foreign states to determine whether they are violative of the public policy prevailing here, and where found to be so violative, such acts have uniformly been refused enforcement here. *Second Russian Insurance Co.* v. *Miller*, 297 Fed. 464 (2d Cir. 1924), aff'd, 268 U. S. 552 (1925); *Vladikavkazsky Ry.* v. *New York Trust Co.*, 263 N. Y. 309, 189 N. E. 456 (1934); *Plesch* v. *Banque Nationale de la République d'Haiti*, 273 App. Div. 224, 77 N. Y. S. 2d 43 (1st Dep't), aff'd *per curiam*, 298 N. Y. 573, 81 N. E. 2d 106 (1948), 81 N. E. 2d 106 (1948); *Stephen* v. *Zivnostenska Banka Nat'l Corp.*, 155 N. Y. S. 2d 340 (Sup. Ct.), aff'd mem., 2 App. Div. 2d 958, 157 N. Y. S. 2d 904 (1st Dep't, 1956), aff'd mem., 3 N. Y. 2d 862, 145 N. E. 2d 24, 166 N. Y. S. 2d 309 (1957), appeal dismissed for want of substantial federal question, 356 U. S. 22 (1958) (mem.).

The cases here summarized, as well as others to be presented in Point Four to follow, would appear to establish beyond successful challenge that the doctrine of compulsory abstention from examination of the acts of a foreign government has not been accepted either by this Court or by other courts in this country. On the contrary, in direct contradiction to the premise of the alleged doctrine of compulsory abstention, the courts of this country appear uniformly to have inquired into the acts of foreign states for their lawfulness on many grounds.

The Government's *amicus* brief argues that the District Court declared an exception to the act of state doctrine which would permit judicial examination of acts of foreign states where they appear to be in contravention of international law. Fortunately, there has never been any rule, to which an exception need be made, that this Court is foreclosed from inquiry into such acts. Indeed, the two decisions of this Court relied upon by the United States brief, *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918), and *Shapleigh* v. *Mier*, 299 U. S. 468, 470 (1937), show clearly that the most careful judicial examination was made to determine whether a violation of international law had resulted from the acts of the foreign state. Ironically, Petitioner and the Government, although contending that the District Court created an exception to the act of state doctrine, are asking this Court to establish an exception to the traditional rule, which requires application of international law, whereby this Court would close its eyes to the fact that acts of foreign states contravene international law. The only justification given by the Government is that the application of international law would in some unexplained way endanger foreign relations.

IV

The appropriate application of the act of state doctrine does not require compulsory deference by the courts of the United States to the acts of another state which are in violation of international law.

The basic policy which underlies the act of state doctrine, to the extent that it has in fact been accepted in the practice of states, is an instrumental one: the function of the doctrine is to insure that the basic, substantive policies of international law—both the jurisdictional policies which allocate competence among states to prescribe and apply law for particular events and the constitutional policies about state responsibility which impose certain minimum standards upon the exercise of such allotted competence—are made effective across state lines, despite the continuous movement of persons and goods. What is at stake in the application of the genuine, as contrasted with the spurious, act of state doctrine is, thus, the maintenance of a certain stability in peoples' expectations that the coercive power of states is not to be employed arbitrarily in the destruction of persons and property but rather in accordance both with certain uniformities of reciprocal tolerance in the assertion of competence and with certain generally accepted standards of justice in the detailed application of such competence. It should require little argument that the transposition of an instrumental doctrine designed to serve international law into an independent, absolute, slot-machine doctrine designed to sustain and enforce state decisions irrespective of conformity to international law would constitute a singular achievement in irrationality.

A position much more in the common interest is that elaborated by an eminent authority on international law, and late member of the International Court of Justice, Judge Sir Hersh Lauterpacht:

> "Whatever may be the rule of International Law as to the duty of States (and their courts) to recognize the **effects of foreign legislation within the foreign country** concerned, it would appear that there is no such obligation with respect to foreign legislation, whatever **the place of its purported effect, which is in itself contrary** to International Law. Such legislation may properly be treated as a nullity and, with regard to rights of property, as incapable of transferring title to the State either within its territory or outside it. Thus, for instance, if a foreign State were to enact legislation confiscating without compensation the property of all citizens of the United Kingdom of the Protestant faith—an act clearly contrary to International Law—municipal courts, whether English or foreign, would be entitled and bound to disregard the effect of such legislation with regard to property forming the subject matter of any action brought before them. This would be so even if title to that property had passed, under the law of that State, to the State itself or some other party. Courts may be under a constitutional compulsion to give effect to the law of their own sovereign legislature even if violative of International Law—although, as noted, they will not lightly impute to it the intention to violate International Law and although in some countries courts have in fact the power to refuse to give effect to national legislation contrary to International Law. There is in any case no compelling reason why they should assist in giving effect to violations of International Law. In the absence of compulsory jurisdiction of international tribunals and having regard to the prohibition, under

> the Charter of the United Nations and elsewhere, of compulsive means of enforcement of International Law by national action, municipal courts may on occasions provide the only means for securing respect for International Law in this and other spheres. It would thus seem that neither principle nor practice countenance a rule which, by reference to International Law, obliges—or permits—courts to endow with legal effect legislative and other acts of foreign States which are in violation of International Law." Lauterpacht, 1 *Oppenheim's International Law* 267-270 (8th ed. 1955).

This passage alone offers ample answer to the argument of the Government that an exception should be made to this Court's long established practice of examining acts of foreign states for determining whether there is a violation of international law and of applying that law in appropriate cases.

Although some of the cases cited by the Government in its *amicus* brief as allegedly establishing a doctrine of compulsory abstention by this Court from examining acts of foreign states for violation of international law are elsewhere discussed in this brief, we shall here consider each of them in the context of their chronological order to show that they do not support such a doctrine.

As the Government relies heavily on *Underhill* v. *Hernandez* in its effort to establish a modern origin of the alleged doctrine, an examination of the precedents cited in that case is appropriate.

The early English case of *Blad* v. *Banfield*, 3 Swan. 604, 36 Eng. Rep. 992 (1674), discussed under section A of Point III of this brief, involved a grant of fishing rights by Denmark to Blad, a Dane, in the Danish territory of Iceland. When Englishmen fished in the water off Iceland in

violation of the Danish domestic rights of Blad, the Government of Denmark seized their property in Iceland. Later, when Blad was sued in England by the English fishermen, he in turn enjoined their actions against him, the court refusing to question the validity of the domestic law of Denmark. No violation of international law was charged by the parties nor did the court even consider that question. Thus, this case has no bearing whatsoever upon the case now before this Court.

The case of *Ware* v. *Hylton*, referred to by name only, on page 14 of the Government's *amicus* brief, in accordance with well established principles of international law, held that the peace treaty between the United States and England prevailed as the law of the land over a Virginia Statute designed to release Virginia debtors from liability to British subjects when payment was made into the Virginia treasury, 3 Dall. 199 (U. S. 1796).

The quotation from *The Santissima Trinidad*, 7 Wheat. 283 (1822), on page 14 of the Government's *amicus* brief, is taken completely out of the context in which it was used by this Court for locating the nationality of a public vessel in the nation that issued her commission, a well-recognized rule of international law. To the extent that the case of *The Santissima Trinidad* on its principal issue has any relevance to the instant case, it supports the constitutional rule that American courts are to apply international law in appropriate cases. This Court found that by illegally augmenting the force of the ship in the waters of the United States, the defendants violated the law of nations and were liable for restitution. *Id.* 348.

The Civil War case of *Williams* v. *Bruffy*, referred to on page 14 of the Government's *amicus* brief, held merely

that all legislation of the Confederate States, including its enemy alien property law, was invalid because those States did not establish themselves as an independent nation state. 96 U. S. 176, 191-192 (1877).

In our view, this earlier series of cases lends no support to the position expressed in the Government's *amicus* brief that the origins of an alleged rule of compulsory abstention by this Court in cases involving acts of foreign states in contravention of international law predates the *Underhill* case. On the other hand, these cases reinforce the long-held rule of this Court that international law is the law of the land and is to be applied by American courts in cases under their jurisdiction.

Although we discussed *Underhill* v. *Hernandez* in Section A of Point III of this brief to show that this Court does not consider the act of state doctrine to be a rule of international law requiring compulsory abstention by courts in the United States with respect to confiscatory acts of foreign states, here we show that the case does not support the doctrine that the substantive requirements of international law must be ignored.

The Government's brief assumes that a violation of international law occurred in *Underhill*. However, Chief Justice Fuller refers to the conduct complained of as "acts of legitimate warfare." Thus, there does not appear to have been any violation of law on the part of the defendant or Venezuela to sustain the claim of plaintiff. However, the significant point is that if any immunity were relied upon by the Court in reaching its decision, it was the immunity of a governmental official for acts in the performance of his office. Certainly the case lends no support to any alleged rule of compulsory abstention by this Court

from examining into acts of a foreign state, for the most careful examination was in fact made of the acts there in question.

The Government brief on pages 15-16 relies heavily upon the decision of the circuit court of appeals in *Underhill* v. *Hernandez* and quotes approvingly from its opinion to the effect that "Foreign citizens can rely upon the intervention of their respective governments to redress their wrongs, even by a resort, if necessary to the arbitrament of war." 65 Fed. 577, 579 (2 Cir. 1895). Whatever may have been an acceptable sanction for a violation of international law in the period prior to the Spanish-American War, it does appear unusual in 1963 for the Government to attempt to rationalize compulsory judicial abstention from a consideration of a violation of international law by a foreign state on the ground that war may provide an alternative.

In the Government's *amicus* brief in footnote 14 on pages 14-15, reference is made to a House of Lords decision in *Duke of Brunswick* v. *King of Hanover*, 2 H. L. C. 1 (1848), and the New York case of *Hatch* v. *Baez*, 7 Hun 596 (N. Y. Sup. Ct. 1876). Neither case supports the alleged doctrine of compulsory judicial abstention. The former held that a foreign sovereign, there the King, was immune from exercise of jurisdiction by an English court for an act performed in his sovereign capacity abroad, while the latter recognized the same immunity of the defendant as President of St. Domingo.

Of course, the decision in *The Schooner Exchange* v. *McFaddon*, 7 Cranch 116 (1816), referred to in the same footnote of the Government's *amicus* brief, is the leading American case on the immunity of armed vessels of a for-

eign state. There, the American libelants contended that their schooner had been seized on the high seas by France, and being in the harbor of Philadelphia should be returned to them. It was found that the schooner had been armed as a French naval vessel and commissioned as such by the Emperor of France. On that basis, this Court held the *Exchange* to be immune from the exercise of jurisdiction on the grounds of sovereign immunity. Thus, this Court applied the well-accepted international law rule of state immunity and not the alleged doctrine of compulsory judicial abstention.

In *American Banana Co.* v. *United Fruit Co.*, 213 U. S. 347 (1909), mentioned on page 16 of the Government's *amicus* brief, the action was to apply a United States statute to a United States corporation for its conduct alleged to be in violation of that statute but taking place wholly in a foreign country. This Court refused to apply the United States statute extraterritorially. There was no occasion to consider and the Court did not in fact consider whether there had been any violation of international law. The case itself involved no question of the applicability of the act of state doctrine.

Although the case of *Oetjen* v. *Central Leather Co.*, 246 U. S. 297 (1918), involved a confiscation by a foreign state and represents an application of the act of state doctrine, of course, the decision does not support a rule that this Court is compelled to abstain from examining an act of a foreign state that contravenes international law. There, the Mexican Government expropriated property belonging to a Mexican partnership. Thereafter that government sold the property to an American company that imported it into the United States. Plaintiff, the assignee of the Mexican partnership, sought to replevy the property but

this Court affirmed a judgment for the defendant. Of course, the expropriation by Mexico of a Mexican's property did not invoke the international law of state responsibility and thus the case does not support the position of Petitioner or the Government in the instant case. On the other hand, the *Oetjen* decision on its facts represents an appropriate application of the act of state doctrine to provide stability of expectations in regard to a transaction that occurred wholly in Mexico and was devoid of international contacts. Recognizing this policy, this Court said:

> "Plainly this was action in Mexico, of the legitimate Mexican government when dealing with a Mexican citizen, and, as we have seen, for the soundest reasons, and upon repeated decisions of this court such action is not subject to reexamination and modification by the courts of this country." *Id.* 303.

Certainly, the *Oetjen* case is not, as the Government contends dispositive of the instant one and does not support its claimed extension of the act of state doctrine to compel judicial abstention in cases under this Court's jurisdiction in the face of acts of state in flagrant violation of international law.

The case of *Ricaud* v. *American Metal Co.*, 246 U. S. 304 (1918) concerned title to property expropriated by Mexico after it had been purchased by the plaintiff, a United States national, from its Mexican original owner, although at the time of expropriation the purchase price had not been paid. The property was sold by Mexico to the defendant who brought it into the United States where a purchaser from the former owner sued for possession. After the district court held for plaintiff, the court of appeals certified three questions to this Court:

The first question, which this Court answered affirmatively, was:

> "Assuming that the bullion in question was seized, condemned, and sold for war supplies by the Constitutionalist forces in revolution in Mexico, acting under authority from General Carranza, claiming to be the Provisional President of the Republic of Mexico," did the district court have "jurisdiction to try and adjudge as to the validity of the title" acquired by the expropriation? *Id.* 307-308.

The third question was:

> ". . . did the seizure, condemnation and sale of the bullion in the manner and for the purposes stated to be assumed in question one have the effect of divesting title to ownership of it of a certain citizen of the United States . . .?" *Id.* 310.

The Court answered this question affirmatively, "for the reasons given" in *Oetjen*. Thus, the answer of this Court was based upon the assumptions of question one, which included a sale of the bullion for war supplies, and the authority of *Oetjen* which also involved the sale of confiscated domestic private property for the support of the revolutionary army. The decision in *Oetjen* stands for the limited proposition that domestic acts of a foreign state are not subject to judicial action in courts in the United States. The heavy reliance of the Court upon *Oetjen* and its apparent consideration that the facts of the two cases were almost parallel indicate that the question of whether there was a violation of international law in the acts of Mexico was probably not seriously considered. Indeed, the assumptions of certified question one postulate a legitimate

domestic act in the prosecution of a war. Certainly, certified question one did not raise a question of violation of international law and the opinion of this Court in *Ricaud* does not expressly state that the act of state doctrine demands compulsory abstention by courts of the United States in cases under their jurisdiction in the face of violations of international law by the acting state. Thus, the *Ricaud* case is far from firmly establishing the compulsory abstention doctrine, as the Government's *amicus* brief states on page 12, in cases of violations of international law.

Shapleigh v. *Mier*, 299 U. S. 468 (1937) is referred to in the Government's *amicus* brief on page 20 as a case in which this Court applied the alleged doctrine. However, the facts and stipulations there so differentiate the case from the instant one that it cannot be considered authority for the Government's proposed irrational extension of the act of state doctrine to require the compulsory abstention of this Court in a case involving a violation of international law. In fact, the *Shapleigh* case did not consider any violation of international law.

That case involved title to land in the Mexican State of Chihuahua that had been seized by Mexico under laws valid domestically. Plaintiffs and those from whom they claimed title were duly notified of the pending seizure and were given opportunity to prove their title, but they failed to do so. Defendant then purchased the land from the state. Thereafter, following an avulsion of the Rio Grande River, a part of territory of Mexico on the south bank, including the land in question, became a part of the United States, but under treaty private ownership was unaffected. There was no question of a violation of international law before this Court in *Shapleigh*, for it stated:

> "Petitioners concede that the expropriation decree if lawful and effective under the Constitution and laws of Mexico, must be recognized as lawful and effective under the laws of the United States. . . . The question is not here whether the proceeding was so conducted as to be a wrong to our nationals under the doctrines of international law. . . ." *Id.* 471

Thus, *Shapleigh* v. *Mier* is not authority for the contention of the Government in the instant case. In view of the facts of the case and the admission by the Court and the plaintiff that the sole question involved the validity of the seizure under Mexican domestic law, the Statement on page 25 of the Government's *amicus* brief that the " 'international law' exception to the act of state doctrine" was summarily rejected by the *Shapleigh* case is not supportable.

Not a single case decided by this Court and included in the argument of Government's *amicus* brief supports its demand that a court in the United States is compelled to abstain from deciding title to property in a case under its jurisdiction and involving an act of a foreign state in flagrant violation of international law. The cases of *United States* v. *Belmont*, 301 U. S. 324, and *United States* v. *Pink*, 315 U. S. 203, cited in footnote 10 on page 20 of the Government's *amicus* brief, bear no relevance to the instant case. This Court in neither case considered the question of whether the Soviet expropriatory decrees were in violation of international law. They both were decided upon the basis of an international agreement between the United States and the Soviet Union providing for a means of settling claims arising out of Soviet expropriations. They do show that this Court does apply international law as the law of the land in appropriate cases.

No cases decided by other courts and cited in the Government's *amicus* brief support its demand for compulsory abstention by this Court and other American courts in cases such as the instant one. In view of this complete lack of precedent for the extreme demand of the petitioner and the Government, this Court should not extend the act of state doctrine in a manner that would protect and immunize an act of a foreign state in contravention of international law.

V

The appropriate application of the act of state doctrine should not authorize a plaintiff to invoke the act of a foreign state as a basis for a cause of action; when a state or its agent becomes a plaintiff, it thereby waives its claim to preclude an examination of such act on its merits.

It should be observed that the contention of the Petitioner and of the Government in this case is not merely that this Court should not examine the lawfulness under international law of the foreign act of confiscation, but further that this Court should give a positive effect to that act with respect to assets now in this country and in a way to affect the rights of United States citizens. The Petitioner, an instrumentality of the Cuban Government, demands in the instant case that this Court take cognizance of the Cuban confiscation decrees to the extent of finding that they establish in the Petitioner plaintiff a prior right over that of the citizen defendants in the assets located within the United States. The Petitioner seeks, however, at the same time that it invokes the positive application of

the Cuban decrees, to ring down the act of state doctrine and preclude a negative finding about the conformity of the decrees to international law. In effect, the *amicus* brief of the Government, therefore, urges affirmative review of the Cuban expropriatory decrees to permit effectuation of an act of a foreign state in violation of international law but disputes this Court's authority to review the decrees negatively to deny them effect.

There would appear sound grounds for a decision that when a foreign state affirmatively seeks, as plaintiff in the courts of this country, to rely upon its official acts as a basis for its claim, it be held to submit its acts for a possibly negative, as well as affirmative, appraisal of the lawfulness of its acts under international law. Typically, cases which have applied the doctrine of act of state have involved a plaintiff's attack against the act of the foreign state upon which the defendant relies for title to the property in dispute. In those cases in which the foreign act was in accord with the minimum expectations of the world community as to the standards of treatment of persons and property across state lines and other international law requirements, the doctrine has on occasion been appropriately applied to preclude recovery.

When the plaintiff bases his claim upon the foreign act, the rules of conflict of laws or private international law usually result in a court's not giving it affirmative effect if the act "violate some fundamental principle of justice, some prevalent conception of good morals, some deep rooted tradition of the common weal." *Loucks* v. *Standard Oil Co. of New York*, 224 N. Y. 99, 111, 120 N. E. 198, 202 (1918); See, Goodrich, *Conflict of Laws* (3rd E. 1949) 21-22. Clearly, the circumstances of the Cuban confiscations, discussed in detail in the briefs of other *amici* indicate that

they meet the *Loucks* test for denial of effect in a court in the United States. The concept is similar to the well-established rule whereby, in absence of international agreement, one state refuses to enforce another's penal laws. Had the Cuban decree purported to tax the property in question by 50%, a court in the United States would not have enforced a claim of the Cuban Government to recover the tax from the proceeds of the sugar sale. There is no reason for our courts to effectuate the Cuban decree which takes 100% of that property.

Petitioner's position in the instant case would appear on all fours with that of a plaintiff nation-state that seeks to invoke the well-established international law principle of sovereign or state immunity. In a case involving a suit by a foreign state on a deposit account against the depositary bank, this Court held that the bank was entitled to avail itself of a defensive counterclaim on defaulted bonds issued by that state and held by the bank. *National City Bank* v. *Republic of China*, 348 U. S. 356 (1955). Mr. Justice Frankfurter's remarks there are acutely applicable to the instant case:

> "The short of the matter is that we are not dealing with an attempt to bring a recognized foreign government into one of our courts as a defendant and subject it to the rule of law to which nongovernmental obligors must bow. We have a foreign government invoking our law but resisting a claim against it which fairly would curtail its recovery. It wants our law, like any other litigant, but it wants it free from the claims of justice . . . Thus it seems only fair to subject a foreign sovereign, coming into our courts by its own choice, to a liability substantially less than our own Government long ago willingly assumed." Id. 361-363.

Petitioner in the case now before this Court is in no different position. See, *Proposed Official Drafts of the Restatement of the Foreign Relations Law of the United States* §73(2) (1962).

The underlying policy of the state immunity rule is to insure amicable relations between states. To do justice in the instant case would create no greater risk to amicable foreign relations than did the decision of this Court in the *National City Bank* case.

Moreover, to deny respondents in this case a valid and complete defense under international law as the law of the land may well violate the due process clause of the Fifth Amendment of the Constitution. *Cf. Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930) where the refusal to permit a valid defense to an action on an insurance policy was held to be a denial of due process of law.

VI

The maintenance of both an international economy and stable community expectations about international law requires that courts apply international law when necessary for the protection of private rights.

In conclusion, we would emphasize the point, hopefully too obvious to be ignored, that any decision by any branch of our government about the management of the foreign affairs of our country should be a function of the fundamental policy objectives of our whole national community. These fundamental policy objectives are not of course static and fixed but are always being clarified and reclarified in a process of decision in which all branches of our

government participate. High in priority among the fundamental objectives to which, historically, not only all three branches of our government but also most of our people have subscribed has, however, been that of promoting and extending the rule of law throughout the entire world community of which our country is an inextricable and interdependent part. Two of the most basic goals which, because of our deep demands for both a free and abundant society, we have sought within this over-riding fundamental policy have been the establishment and securing of both a minimum public order in which peoples are free from the application of arbitrary coercion to their lives and property and a pluralistic international economy in which both government and free enterprise have appropriate roles. For the clarification and reclarification of the more detailed policies necessary to the effective pursuit of these basic goals, we have established and maintained a constitutional structure in which the three branches of the government are balanced against each other and in which an independent judiciary has been accorded an important role in the articulation and application of the international law which we share with the other peoples of the world. The assumption upon which this constitutional structure has been based is that courts have certain unique capabilities for consolidating and applying limitations upon both foreign and domestic arbitrary power, whether executive or other. Within this constitutional structure, the Executive has been accorded a very considerable discretion in the day-to-day conduct of official-to-official negotiations, but it has always been required that this discretion be exercised within the framework of the more fundamental policies established in coordination with the other branches of the

government and it has never been permitted that this discretion could suspend for long the entire function of another coordinate branch of the government. The success with which this constitutional system has worked throughout the difficult history of our country would not appear to suggest that it should now be changed to accord the Executive a relative monopoly in the articulation and application of international law in the even more difficult future which lies ahead.

The argument in the Government's *amicus* brief that the doctrine of automatic, compulsory abstention would promote an international economy, while "Decisions invalidating foreign acts of state would have disruptive effects upon international transactions," page 26, defies credibility. "Even assuming that there may be *bona fide* purchasers of confiscated properties, unless *bona fide* investors are accorded a reasonable protection, certainly it can be expected that less goods will shortly be available for acquisition by even the most *bona fide* purchasers. The necessary protection for *bona fide* investors can, further, scarcely be found in the holding demanded by the Government that their interests are completely subject to any momentary determination of political expedience by the Executive. If confiscatory acts of state in violation of international law are immunized in national courts, there can only be a diminishing volume of international transactions to be disrupted. It already appears that free world private investment patterns are shifting funds from areas where state seizure is a danger to areas that appear to minimize such risk. The occasion would not appear propitious for abandoning whatever deterrent value against arbitrary and capricious behavior the application of international law may have.

Similarly, the most general arguments advanced in the Government's *amicus* brief that "American judicial decisions in the act of state cases would not be likely to advance the development of principles of international law," page 27, and that "The primary and most satisfactory way to deal with acts of a foreign state which violate international law is the exercise of diplomacy" would appear illusorily to prove too much. The considerations adduced, that the decisions taken might be regarded "in many other nations as reflecting merely parochial American views partisan to American national interests," Government's *amicus* brief pages 27, 28, and that in "the absence of an international tribunal with power to settle controversies arising from sovereign acts," page 28, the decisions by American courts must be too "sporadic" to be effective, would apply equally to any other problems arising from interactions across state lines and are tantamount to an invitation to this Court to excuse itself from any future consequential role in the clarification and application of international law.[9] This argument appears to us extraordinary and unnecessarily to minimize the historic role which this Court and other courts have played in establishing and maintaining law across state lines and to forego one of our best available future hopes.

This Court can continue, we would urge in sum, to make important contributions to progress toward a law-governed world by maintaining its historic competence to apply

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9. Indeed this Court has expressly denied that its decision on the merits in a state immunity case would not reflect such narrow considerations. *National City Bank of New York* v. *Republic of China*, 348 U. S. 356, (1955). There, Mr. Justice Frankfurter said: "No parochial bias is manifest in our courts which would make it an affront to the 'power and dignity' of the Republic of China for us to subject it to counterclaims * * *" *id.* 363.

international law in cases appropriately before it. In making this contribution, this Court need not be precluded by the alleged international doctrine of automatic, compulsory abstention in relation to the acts of foreign governments, from applying the genuine international law concerning the responsibility of states and the allocation of competence among them. The admonition which Mr. Justice Brennan applied in *Baker* v. *Carr*, 369 U. S. 186 (1962), to the "political question" doctrine is no less applicable to the act of state doctrine. "The political question doctrine," Mr. Justice Brennan said, "a tool for the maintenance of governmental order, will not be applied so as to promote only disorder." *Id.* 215.

Conclusion

For the reasons stated it is respectfully submitted that the judgment should be affirmed.

Respectfully submitted,

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